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No. 07-1529

In The
Supreme Court of the United States

JESSE JAY MONTEJO,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

SUPPLEMENTAL REPLY BRIEF FOR RESPONDENT

JAMES D. "BUDDY" CALDWELL
LOUISIANA ATTORNEY GENERAL
S. KYLE DUNCAN
APPELLATE CHIEF
LOUISIANA DEPARTMENT OF JUSTICE

POST OFFICE BOX 94005
BATON ROUGE, LA 70804
(225) 326-6765

KATHRYN LANDRY
Counsel of Record
WALTER P. REED
HOUSTON C. GASCON, III
SCOTT C. GARDNER
ST. TAMMANY PARISH
DISTRICT ATTORNEY'S OFFICE

POST OFFICE BOX 82659
BATON ROUGE, LA 70884
(225) 766-0223

Counsel for Respondent State of Louisiana

April 24, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

SUPPLEMENTAL QUESTION PRESENTED

Should *Michigan v. Jackson*, 475 U.S. 625 (1986), be overruled?

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ARGUMENT

I. OVERRULING *JACKSON*'S OBSOLETE RULE WILL CLARIFY SIXTH AMENDMENT JURISPRUDENCE AND PRACTICE.

Without actually defending its reasoning, Montejo claims that *Michigan v. Jackson* "is fully consistent with the Court's Fifth and Sixth Amendment decisions over ... nearly a quarter century." Pet'r Suppl. Br., at 15. That is stunningly wrong. As Louisiana's Supplemental Brief explains, subsequent decisions have left *Jackson* in tatters:

- *Jackson* said an indictment created "even stronger" reasons for barring questioning of an uncounseled accused, 475 U.S. 625, 631 (1986), but *Patterson v. Illinois* soon after explained an indictment "does not substantially increase the value of counsel … or expand [his] limited purpose … when the accused is questioned by authorities." 487 U.S. 285, 298 (1988).

- *Jackson* broadly construed a request for counsel to trigger *Edwards* and bar subsequent waivers, 475 U.S., at 633, but *Davis v. United States* then narrowly construed the same *Edwards* request. 512 U.S. 452, 459-61 (1994).

- *Jackson* interpreted a Sixth Amendment invocation to include a Fifth Amendment request for counsel, 475 U.S., at 632-33, but *McNeil v. Wisconsin* later explained that invoking the Sixth "is, as a matter of *fact, not*

> to invoke the [Fifth Amendment] interest." 501 U.S. 171, 178 (1991).

See also Resp't Suppl. Br., at 6-13. These cases do not "clarif[y] the scope of [*Jackson*'s] rule," Pet'r Suppl. Br., at 17. They clarify that *Jackson*'s rule has been orphaned.

Jackson's erosion has not occurred in secret.[1] Moreover, what was being eroded was *Jackson*'s already brittle foundation in Fifth Amendment anti-coercion jurisprudence. Importing those concerns into the Sixth Amendment "ma[de] no sense at all," *Jackson*, 475 U.S., at 640 (Rehnquist, J., dissenting), as other Justices have since recognized. *See Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (discussing *Jackson*'s subversion of *Edwards*); *see also* Resp't Suppl. Br., at 6-9.

Understandably, Montejo avoids explaining why "subsequent cases have [not] undermined [*Jackson*'s] doctrinal underpinnings." Pet'r Suppl. Br. at 15 (quoting *Dickerson v. United States*, 500 U.S. 428, 443 (2000)). Instead, Montejo defends *Jackson* on grounds of policy and practicality. Part II *infra* explains why Montejo's policy arguments

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[1] *See, e.g., Patterson*, 487 U.S., at 305-06 & n.3 (Stevens, J., dissenting) (arguing the majority "backs away from the significance previously attributed to the initiation of formal proceedings," citing, *inter alia*, *Jackson*); *McNeil*, 501 U.S., at 185 (Stevens, J., dissenting) (arguing majority's "approach of construing ambiguous requests for counsel … is the opposite of that taken in *Jackson*"); *Davis*, 512 U.S., at 469-70 (Souter, J., concurring) (criticizing majority because "requests for counsel [should] be 'give[n] a broad, rather than a narrow, interpretation,'" quoting *Jackson*).

fail. The remainder of this Part explains why overruling *Jackson* will not "create a host of difficulties that would cloud the Sixth Amendment for years to come," Pet'r Suppl. Br., at 9, but will instead clarify the Sixth Amendment.

Montejo argues that overruling *Jackson* will (1) raise "innumerable questions" about whether a defendant has sufficiently invoked *Edwards* at an arraignment (*id.*, at 10); (2) proliferate variations on *Miranda* waivers for different Sixth Amendment situations (*id.*, at 11-12); and (3) encourage police to undermine the Sixth Amendment by "try[ing] to reach defendants before they have had a chance to consult with counsel" (*id.*, at 13-14). These arguments exaggerate the consequences of abandoning *Jackson*.

Montejo is wrong that overruling *Jackson* would "replace [*Jackson*] with a Fifth Amendment rule designed to protect a completely different constitutional right." *Id.*, at 17. That is backwards. It was *Jackson* itself that dragged into the Sixth Amendment the *Edwards* rule—a "rule designed to protect a completely different constitutional right." *Id.* *Jackson* itself transplanted *Edwards* from its native interrogation environment into a context divorced from a "suspect's choice to speak with investigators." *Cobb*, 532 U.S., at 176 (Kennedy, J., concurring). And, finally, *Jackson* itself pegged its new rule to a fortuitous request for counsel that, as *McNeil* taught, does not implicate the Fifth Amendment. 501 U.S., at 178. Consequently, overruling *Jackson* would not "replace" its illogical rule with *anything*, but would rather "bring[] [the Court's] Fifth and Sixth Amendment jurisprudence

into a logical alignment." *Id.*, at 183 (Kennedy, J., concurring).

Montejo's warnings thus ring hollow. First, courts will not face "innumerable questions" about a possible *Edwards* request at arraignment, because *Jackson*'s demise will remove the need to reach such questions. No longer could an accused potentially trigger *Edwards* in the alien context of an arraignment. That would be a wholesome development, since the Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *McNeil*, 501 U.S., at 182 n.3 (citations omitted). By restoring the principle that "[m]ost rights must be asserted when the government seeks to take the action they protect against," *id.*, discarding *Jackson* would clarify rather than complicate arraignments.

Second, *Patterson* answers Montejo's fear that overruling *Jackson* would multiply *Miranda* variations. *Patterson* held that, for waiver-of-counsel purposes, pre- and post-indictment suspects occupy the same position. 487 U.S., at 298-99. Thus, standard *Miranda* warnings "convey[] … the sum and substance of the rights that the Sixth Amendment provide[s]." *Id.*, at 293. That is because counsel's "simple," "limited" and "unidimensional" role during questioning merits "a waiver procedure … likewise simple and limited." *Id.*, at 294 n.6, 298-300.[2]

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[2] *Patterson* did not involve "a completely different situation," Pet'r Suppl. Br. at 11 n.3, because the accused had not retained or accepted counsel. *Patterson* pointed that out—not to suggest that a different waiver standard would apply—

Moreover, *Patterson* rejected lower courts' "suggest[ions] that something beyond *Miranda* warnings is … required" to validate a Sixth Amendment waiver during questioning. *Id.*, at 294-95 & n.8. *Patterson* thus forecloses Montejo's "rather nebulous suggestion" to the contrary. *Id.*, at 294. Since *Jackson* applies only to questioning, one need not speculate about waivers in other situations—although the Court could readily formulate them in future cases. *Cf. Patterson*, 487 U.S., at 298.

Finally, Montejo suggests that overruling *Jackson* will "condition Sixth Amendment protections on the outcome of a race between the police and appointed defense counsel to meet with the defendant." Pet'r Suppl. Br., at 13. But retiring *Jackson* will not touch the Sixth Amendment's *substantive* protections. Counsel will still be guaranteed at critical stages, a guarantee buttressed by the "anti-subversion" protection of *Massiah* and by *Miranda-Edwards*. *See* Resp't Suppl. Br., at 22-25. What will change is *procedural*: *Jackson* will no longer presumptively invalidate free and informed waivers. The notion that there is something suspect about the police candidly seeking such waivers is based on a warped notion of counsel's Sixth Amendment role. *See* Resp't Suppl. Br., at 13-22.

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but to clarify it was not addressing a *Moulton* situation (where no waiver is *possible*) nor a *Jackson* situation (where any waiver is *presumptively invalidated*). *See Patterson*, 487 U.S., at 290 n.3; *Maine v. Moulton*, 474 U.S. 159, 163-66, 172-74 (1985).

II. *JACKSON* DOES NOT RATIONALLY FURTHER DISTINCT SIXTH AMENDMENT INTERESTS.

Montejo then flees to policy. He argues *Jackson* furthers an accused's "distinct" Sixth Amendment "right 'to rely on counsel as a "medium" between him and the State.'" Pet'r Suppl. Br., at 3 (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). Louisiana agrees with Montejo that "[t]he Fifth and Sixth Amendments protect an accused in distinct ways." Resp't Suppl. Br., at 1. But, from that premise, Louisiana draws the opposite conclusion about *Jackson*. *Jackson* imported a Fifth Amendment anti-coercion rule that distorts counsel's Sixth Amendment role as a "guide through complex legal technicalities," *id.*, at 14 (quoting *United States v. Ash*, 413 U.S. 300, 307 (1973)), and exaggerates counsel's "simple and limited" role during questioning. *See Patterson*, 487 U.S., at 300; Resp't Suppl. Br., at 13-18, 18-22. In short, Sixth Amendment counsel is supposed to be an accused's expert mouthpiece, but *Jackson* turned him into a muffler.

Montejo's policy defense of *Jackson* rests on Sixth Amendment boilerplate, failing even to recognize counsel's variable Sixth Amendment roles at different critical stages. *See generally Patterson*, 487 U.S., at 298-99. Instead he simply defends precedents such as *Moulton*, *Massiah*, and *Henry*, mistakenly fearing them threatened by overruling *Jackson*. *See, e.g.,* Pet'r Suppl. Br., at 12 (warning that "*Henry* and *Moulton* … should arguably come out the other way"); *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Henry*, 447 U.S.

264 (1980). But Montejo misses that *Jackson* illogically *extends* those "surreptitious investigation" cases into a context where "the conduct of the police was totally open and above-board." *Jackson*, 475 U.S., at 641 n.4 (Rehnquist, J., dissenting). Overruling *Jackson* would not affect them. *See* Resp't Suppl. Br., at 3, 23.[3]

Finally, *amici* Public Defender Service *et al.* make a version of Montejo's policy argument by urging that *Jackson* is also supported by "no-contact" ethics rules. *See* Suppl. Br. of *Amici Curiae* Public Defender Service *et al.* ("Public Defender Br."), at 12-16.[4] But there are numerous problems with pegging Sixth Amendment protections to the "sub-constitutional recommendations of even so esteemed a body as the American Bar Association." *Moran*, 475 U.S., at 427-28. First, since ethical rules "vary in scope" across jurisdictions, *see* Public Defender Br., at 16 n.4, they would provide an unstable guide for constitutional law. Second, applying "no-contact" rules here would undermine *another* Sixth Amendment principle whose validity is admitted. Both Montejo and *amici* agree that the Sixth Amendment allows an accused to "come

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[3] Montejo also suggests that *Massiah et al.* separately invalidate his Sixth Amendment waiver. Pet'r Suppl. Br., at 18-23. But, as explained in Part III *infra*, Montejo lost that claim below and it is not properly before this Court.

[4] Specifically, *amici* refer to ABA Model Rule of Professional Conduct 4.2 (Feb. 2009), which prohibits a lawyer and his agents, unless otherwise authorized, from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter."

forward and confess to the police of his own accord." Pet'r Suppl. Br., at 14; *see also* Public Defender Br., at 11 (admitting that accused "can always … initiate contact" with the police). But the ABA no-contact rule would swallow that principle since it "applies even though the represented person initiates or consents to the communication." ABA Rule 4.2, cmt. 3.

Most importantly, the Court rejected this argument eight years ago in *Texas v. Cobb*. Declining the dissent's suggestion to use ABA Rule 4.2 to expand the Sixth Amendment, the Court explained that "[e]very profession is competent to define the standards of conduct for its members, but such standards are obviously not controlling in interpretation of constitutional provisions." *Cobb*, 532 U.S., at 171 n.2.

III. THIS CASE SQUARELY POSES WHETHER *JACKSON* SHOULD BE OVERRULED.

This is the right case to overrule *Jackson*, because application of *Jackson*'s anti-waiver rule would invalidate Montejo's post-indictment admission, made after he had properly waived his Sixth Amendment right to counsel under *Patterson*. *See State v. Montejo*, 974 So.2d 1238, 1258-62 (La. 2008).[5] That admission—a written apology to the

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[5] Of course, the Court could resolve the case on the narrower ground that, beyond mutely accepting appointed counsel, Montejo made no "assertion" sufficient to trigger *Jackson*. *See* Resp't Br., at 10-16. But that would leave *Jackson*'s anomalous rule in place. Moreover, while *Jackson* plainly requires a positive "assertion," by continuing to refine that requirement the Court will inevitably confront, in future

victim's wife—corroborated other damning evidence against Montejo, including a lengthy "video-taped police interrogation during which Montejo … admitted that he shot the victim who had unexpectedly returned home and interrupted Montejo's burglary." *Id.*, at 1244.[6] The Louisiana Supreme Court exhaustively analyzed Montejo's Fifth Amendment waivers during the videotaped statements and found them valid under *Miranda*, *Edwards*, and *Oregon v. Bradshaw*. *See id.*, at 1250-58; *id.*, at 1252-54 (discussing *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion)).

This Court originally granted certiorari only to address whether Montejo's silent acceptance of appointed counsel at a 72-hour hearing was enough to trigger *Jackson*. *See* 129 S. Ct. 30 (U.S. Oct. 1, 2008). The validity of Montejo's Fifth Amendment waivers is thus not before the Court. Nor is the question whether Montejo's subsequent Sixth Amendment waiver was valid under *Moran v. Burbine*, which protects (in a way distinct from *Jackson*) the Sixth Amendment counsel right against certain forms of police "interference." *See* 475 U.S. 412, 428 (1986). On the latter issue, the Louisiana Supreme Court noted the facts were unclear about what transpired between Montejo and police investigators on September 10, the morning of Montejo's Sixth Amendment waiver and

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cases, the kinds of record ambiguities and factual disagreements posed here. Better to discard *Jackson*.

[6] The State also proved "the undisputable presence of Montejo's DNA under the victim's fingernails," and its expert "ruled out DNA transfer by coincidental contact." *Id.*, at 1242.

subsequent admission.[7] But the court left those factual matters unresolved, reasoning that, "[e]ven if … the police did tell [Montejo] he did not have a lawyer, this does not rise to the level of the facts presented in *Moran v. Burbine*." 974 So.2d, at 1262 n.69.

Montejo can claim this case is a "poor vehicle" for reconsidering *Jackson* only by re-arguing those Fifth and Sixth Amendment issues not even before this Court. Thus, he says allegedly "harsh tactics" should have invalidated his *Miranda* waivers during the videotaped interviews. Pet'r Suppl. Br., at 18-19. But the Louisiana Supreme Court found, to the contrary, that Montejo's initial *Miranda* invocation was "scrupulously honored." 974 So.2d, at 1254-55. The court found further that Montejo validly retracted his initial request for counsel, *id.*, at 1256, and later "validly waived his *Miranda* rights before the resumption of the interview." *Id.*, at 1258. Montejo cannot use his disagreement with the Louisiana Supreme Court on these issues—which, again, are not before this Court—to avoid the distinct *Jackson* issue that *is* squarely posed.

Montejo also raises the different Sixth Amendment claim that the police lied about whether he had appointed counsel and thus "interfered" with his Sixth Amendment right under *Moran*, 475 U.S.,

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[7] Montejo testified that he told the police he had appointed counsel and that the police said he did not. By contrast, one of the detectives testified that he was unaware that Montejo had received appointed counsel that morning and, more importantly, that Montejo "told him he had not been contacted by an attorney." *See* 974 So.2d, at 1261-62.

at 428-29. Pet'r Suppl. Br., at 19-21. But, as explained above, the Louisiana Supreme Court expressly declined to resolve factual issues about what actually happened, merely stating in *dicta* that Montejo's allegations, even if true, did "not rise to the level of … *Moran*." 974 So.2d, at 1262 n.69.[8] That is a far cry from Montejo's bald assertion that "it is undisputed the police did not tell Montejo that he had counsel." Pet'r Suppl. Br., at 19-20 n.8. Montejo's version of the facts was contested at every step of this case, and has never been adopted by any court. More to the point, this unresolved factual dispute concerning a claim *not before this Court* is no reason to avoid the *Jackson* issue that assuredly *is*.

Furthermore, the record discloses how speculative Montejo's alternate *Moran* claim is. Aside from Montejo's self-serving assertion, there is no evidence that on the morning of September 10 the two detectives deliberately conspired to deceive Montejo about the status of his appointed counsel. To the contrary, there was evidence that, although fully advised of his rights multiple times that morning (JA, p. 67), Montejo *himself* denied he had or wanted counsel when asked by the officers. JA, pp. 82, 145, 179-80, 182. Montejo's tale of police "deceit" came out, not at his suppression hearing, but at the end of trial. By contrast, Montejo's

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[8] Montejo wrongly claims that the Louisiana Supreme Court "reason[ed] … that the police would have been *permitted to lie* about the status of Montejo's counsel under this Court's decision in *Moran*." Pet'r Suppl. Br., at 19-20 n.8 (emphasis added). The court did no such thing.

motion to suppress simply argued that all his statements were involuntary, JA, p. 6, *not* that the police had deceived him. JA, pp. 92-93.

Montejo was a murder suspect with an extensive criminal record, who waived his rights no less than seven times. *See* JA, p. 13; ex. MTS1-7. Prior to the 72-hour hearing, he had already confessed on videotape. Thus, Montejo had a clear motive to accompany the detectives on September 10: he wished to show he had not intended to commit murder, but had only armed himself with the victim's gun once inside the home. Montejo hoped to prove this theory by finding the gun. JA, p. 51.

Montejo, then, was precisely that suspect who chooses to "go it alone" with the police. *See Patterson*, 487 U.S., at 291. He hoped to "avoid the laying of charges by demonstrating an assurance of innocence"—or at least a lesser degree of guilt—"through frank and unassisted answers to questions." *McNeil*, 501 U.S., at 178. To that end, Montejo freely and knowingly waived his Sixth Amendment right to counsel. Far from a "poor vehicle" to reconsider *Jackson*, this is the paradigm case. Here, "the *Edwards* rule operate[d] to preserve [Montejo's] free choice to remain silent," or to talk to police outside counsel's presence. But "if *Jackson* were to apply it would override that choice." *Cobb*, 532 U.S., at 175 (Kennedy, J., concurring).

CONCLUSION

The Court should overrule *Michigan v. Jackson*.

Respectfully submitted,

JAMES D. "BUDDY" CALDWELL
Louisiana Attorney General
S. KYLE DUNCAN
Appellate Chief
Louisiana Department of Justice

Post Office Box 94005
Baton Rouge, LA 70804
(225) 326-6765

KATHRYN LANDRY
Counsel of Record
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HOUSTON C. GASCON, III
SCOTT C. GARDNER
St. Tammany Parish District Attorney's Office

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